BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NANCY A. QUANDT	)	
Claimant	)	
VS.	)	
	)	Docket No. 184,591
IBP, INC.	)	
Self-Insured Respondent	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Respondent appealed the November 10, 2005, Order entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on March 1, 2006. Stacy Parkinson of Olathe, Kansas, served as Board Member Pro Tem in place of Board Member Gary M. Korte, who recused himself from this proceeding.

APPEARANCES

Robert R. Lee of Wichita, Kansas, appeared for claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for respondent. And Derek R. Chappell of Ottawa, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

For purposes of this appeal, the record consists of that set forth in the May 27, 1997, Award entered by Administrative Law Judge Floyd V. Palmer; the transcript of the January 30, 1997, deposition of Nancy R. Downs; the transcript from the July 17, 1998, hearing entitled Review and Modification Hearing; the transcript from the May 21, 1999, hearing entitled Motion Hearing; the transcript from the February 4, 2000, hearing entitled Review and Modification Hearing; the transcript from the May 19, 2000, hearing entitled Motion Hearing; the transcript of the January 11, 2001, deposition of Dr. David G. Kassmeier; the transcript from the February 16, 2001, hearing entitled Motion Hearing; the transcript from the August 10, 2001, hearing entitled Preliminary Hearing; the transcript of the January 29, 2003, deposition of Dr. Patrick W. Bowman; the transcript from the August 1, 2003, hearing entitled Application for Review and Modification Hearing; the

transcript from the August 1, 2003, hearing entitled Post Award Hearing; the transcript from the August 15, 2003, hearing entitled Post Award Hearing; the transcript from the August 5, 2005, hearing entitled Review and Modification and Post Award Hearing; the transcript from the September 2, 2005, hearing entitled Post Award Hearing; the November 4, 1999, independent medical report of Dr. C. Erik Nye; and the Division of Workers Compensation administrative file. In addition, all the exhibits attached to the hearing and deposition transcripts are part of the record, except those exhibits that are barred by K.A.R. 51-3-5a(a).

ISSUES

This is a claim for a March 26, 1993, accident. This claim was initially decided on May 27, 1997, by Administrative Law Judge Floyd V. Palmer. In that Award, Judge Palmer found claimant sustained a 79.25 percent permanent partial general disability for injuries to her neck and right knee. And Judge Palmer assessed the entire award against the Workers Compensation Fund. The Board later affirmed that Award.[1]

This claim returns to the Board regarding claimant's post-award request for additional medical benefits for her low back and respondent's request that the Workers Compensation Fund be found liable for the medical treatment administered to claimant's low back.

In the November 10, 2005, Order, Judge Avery determined claimant's March 1993 accident and the resulting injuries to her neck and right knee aggravated a preexisting condition in her low back. Moreover, the Judge held respondent "did not possess the requisite knowledge of claimant's back condition to invoke the liability of the Workers Compensation Fund" under K.S.A. 44-567(a). Consequently, the Judge denied respondent's request to assess liability against the Workers Compensation Fund (Fund) for the medical treatment administered to claimant's low back. In addition, the Judge granted claimant's request for a treadmill.

Respondent argues Judge Avery erred by (1) finding the treadmill was reasonable and necessary medical treatment, (2) granting claimant compensation for her low back when she did not originally claim a low back injury and the May 1997 Award did not address her low back, and (3) assessing the post-award benefits against respondent when the May 1997 Award assessed the liability for claimant's neck and right knee injuries against the Fund. Accordingly, respondent requests the Board either to deny claimant's request for post-award medical benefits or to assess all the liability against the Fund.

[1] The Board's January 16, 1998, Order affirmed the May 27, 1997, Award.

On the other hand, the Fund contends the November 10, 2005, Order should be affirmed. The Fund argues it cannot be assessed liability for claimant's low back as the evidence is uncontradicted that respondent did not have knowledge of a preexisting condition in that part of her body. In the alternative, the Fund contends the November 10, 2005, Order should be set aside as Judge Avery allegedly had neither the jurisdiction nor the authority to enter that Order. Hence, the Fund argues the issue of Fund liability had been previously determined in a February 11, 2000, Order for Compensation entered by Judge Avery. Consequently, the Fund contends the February 11, 2000, Order for Compensation became a final determination of the liability for claimant's low back condition when the Order was not appealed.

Similarly, claimant contends the November 10, 2005, Order should be affirmed. In the alternative, claimant argues the Board should set aside that Order on the basis that the February 11, 2000, Order was a final determination that claimant was entitled to receive post-award medical benefits for her back.

The issues before the Board on this appeal are:

1. Did the February 11, 2000, Order for Compensation constitute a final determination of claimant's right to receive additional medical benefits for her low back and a final determination regarding the Fund's liability for those post-award medical benefits?

2. Is claimant entitled to post-award medical benefits, including a treadmill, for her low back condition?

3. What is the liability of the Workers Compensation Fund for the workers compensation benefits provided claimant due to her low back?

FINDINGS OF FACT

After considering the record and the parties' arguments, the Board finds:

1. As mentioned above, this claim was initially decided on May 27, 1997, but now returns to the Board regarding claimant's post-award request for additional benefits. In the May 27, 1997, Award, which this Board later affirmed, Administrative Law Judge Floyd V. Palmer determined claimant sustained a 79.25 percent permanent partial general disability for injuries she sustained to her neck and right knee. Judge Palmer assessed the entire award against the Workers Compensation Fund.

2. Following the May 1997 Award, claimant's symptoms worsened, requiring her to seek additional treatment for her upper extremities, neck and low back. Consequently,

claimant filed numerous applications for preliminary hearing along with applications to review and modify her May 1997 Award. As a result, several orders for independent medical evaluations were issued to address whether claimant's additional symptoms and physical complaints were related to her March 1993 accident at work.

3. As a result of the various post-award hearings Dr. Patrick W. Bowman initially was authorized to provide additional medical treatment for claimant's ongoing neck problems. In late September 1998, Dr. Bowman, an orthopedic surgeon, began treating claimant for neck and upper extremity complaints. And in early November 1998, claimant underwent a myelogram, which revealed stenosis or blockage in her spinal neural canal in her neck and in her low back. The worst blockage was located between the seventh cervical and first thoracic (C7-T1) vertebrae, which was one level below an earlier fusion in her neck. And the second blockage, which comprised an approximate 60 percent occlusion, was located in her low back between the fourth and fifth lumbar (L4-5) vertebrae.

4. In December 1998, Dr. Bowman decompressed and fused the C7-T1 vertebrae. But during a late January 1999 post-surgery follow-up visit, claimant advised the doctor her low back symptoms were progressively worsening. Before that visit, claimant's primary complaints, and the doctor's attention, focused upon her neck.

5. On March 10, 1999, claimant filed an application for review and modification and application for post-award medical benefits and attorney fees. The Division of Workers Compensation noted this was an application for review and modification when it sent out its notice of hearing. Shortly after, on April 15, 1999, claimant filed an application for preliminary hearing. The Division of Workers Compensation then notified the parties an application for preliminary hearing had been filed when it sent out the resulting notice of hearing. And on May 12, 1999, claimant's attorney wrote Judge Avery advising that at the upcoming May 21, 1999, preliminary hearing claimant was requesting post-award medical benefits, including the authorization of Dr. Bowman for the treatment of claimant's low back, payment of pharmacy bills, payment of outstanding medical bills, payment of temporary total disability benefits and attorney fees.

6. On May 21, 1999, Judge Avery conducted a hearing to address claimant's request for Dr. Bowman to treat her low back. Following that hearing, the Judge appointed Dr. C. Erik Nye to examine and evaluate claimant to determine if her low back symptoms were related to her March 1993 accident.

7. But before claimant saw Dr. Nye for her independent medical exam she underwent the first of three low back surgeries by Dr. Bowman. After trying a course of conservative treatment, in August 1999 Dr. Bowman fused claimant's lumbar spine at two levels. Therefore, Dr. Nye did not examine and evaluate claimant until early November 1999. At that time, claimant advised Dr. Nye she attributed her neck and low back problems to her

March 1993 accident as she felt she had jammed her whole spine when she fell. In addition, claimant told Dr. Nye that the altered gait she developed following her 1993 accident aggravated her low back. Consequently, Dr. Nye reported to Judge Avery that both the 1993 accident and claimant's altered gait aggravated her low back. In his November 4, 1999, report to Judge Avery, Dr. Nye wrote, in pertinent part:

> Seeing the patient some six years after the injury, reviewing the records that have been made available to me including her deposition of May 1999 it is my opinion that the accident aggravated but did not necessarily cause the significant spinal blockage at L4-5. However, I cannot unequivocally say it didn't. A lot of patients develop this with time just with age-related changes but it is my opinion that she more likely than not aggravated it on her fall in March 1993. A longstanding abnormal gait can certainly aggravate the back as well.

8. The Judge received Dr. Nye's report on approximately November 16, 1999. Two weeks later, on November 30, 1999, claimant filed another application to review and modify her award and application for post-award medical benefits and attorney fees. And on December 16, 1999, claimant filed similar applications, followed by a notice that her motion for review and modification would be heard on February 4, 2000. Shortly after, on January 19, 2000, the Fund filed a motion requesting the Judge to determine its liability.

9. The parties appeared at the February 4, 2000, hearing. The transcript from the hearing does not reflect that the Judge and parties had agreed the hearing was being conducted as a preliminary hearing to address claimant's immediate need for medical benefits and temporary total disability benefits that would be followed by depositions and a final hearing to address claimant's request for additional benefits and the Fund's liability, or whether the hearing was to be considered a final hearing for purposes of the newly raised issues. Nonetheless, respondent did advise the Judge that there was an issue whether claimant's low back complaints were a natural and probable consequence of the right knee injury. The parties presented no medical evidence at the February 4, 2000, hearing as the parties had earlier introduced written medical reports at the May 1999 hearing, mentioned above. Moreover, the Judge did not set terminal dates at the February 4, 2000, hearing and did not request submission letters from the parties.

10. On February 11, 2000, Judge Avery entered an Order for Compensation. That Order stated the February 4, 2000, hearing was conducted to address an application for preliminary hearing. The Order granted claimant temporary total disability benefits and additional medical benefits. Moreover, the Judge assessed those post-award benefits to respondent. The February 11, 2000, Order for Compensation reads:

> Now on this 4th day of February, 2000, the claimant's Application for Preliminary Hearing comes on for hearing before the Administrative Law Judge for

> the Division of Workers Compensation of the State of Kansas. After hearing the evidence and arguments of counsel, it is found that:
>
> **Temporary total disability compensation is hereby granted and ordered paid by respondent and insurance carrier** at the rate of $215.84 per week, commencing April 7, 1999 until further order, or until certified as having reached maximum medical improvement; or released to regular job; or until returned to gainful employment, whichever occurs first.
>
> **Medical treatment is ordered to be paid by respondent and insurance carrier on claimant's behalf** with Dr. Bowman for treatment of claimant's back until further order or until certified as having reached maximum medical improvement.
>
> Cost for temporary total disability and medical treatment to the back is assessed against the respondent, IBP, Inc. Claimant did not have a pre-existing back condition.
>
> **IT IS SO ORDERED.**
>
> Dated this 11th day of February, 2000.

That Order was not appealed to the Board.[2]

11. Immediately following the February 4, 2000, hearing, and while awaiting the Judge's Order, claimant filed another application for review and modification to address the nature and extent of her disability. The Division received that application on February 8, 2000.

12. Over the next three and one-half years the parties continued their prolific filings. Respondent filed three motions to terminate claimant's temporary total disability benefits. Claimant filed at least one more application for preliminary hearing and at least three more applications for post-award medical benefits. And respondent filed at least one request for a final hearing on claimant's applications for additional benefits.

13. In the meantime, claimant developed additional problems in her low back. In March 2002, Dr. Bowman, after claimant began experiencing a loss of bladder function and paralysis in her lower extremities, performed emergency surgery to fuse the third and fourth lumbar (L3-4) vertebrae and regrafted the fusion at L4-5. The doctor believed claimant's problem at L3-4 was directly related to her March 1993 accident because the earlier fusion at L4-5 transferred the spinal load to the next higher disc. Afterwards,

---

[2] Judge Avery indicated in an August 6, 2003, Order that the February 11, 2000, Order for Compensation was appealed to and affirmed by the Board. But the Division records indicate the February 11, 2000, Order was not appealed.

claimant developed a life-threatening infection. Consequently, in August 2002, the doctor again operated on claimant's low back. This time the doctor removed the metal that had been previously used and he again fused the vertebrae.

14. On August 1, 2003, the parties appeared before Judge Avery in two hearings. One of the hearings addressed respondent's request for a final hearing to address claimant's post-award requests and to ask the Judge to schedule terminal dates for submitting evidence. The other hearing addressed claimant's requests for the payment of certain outstanding medical expenses, for authorization to see two doctors that had been recommended by Dr. Bowman, and for a treadmill and water therapy program.

15. On August 6, 2003, Judge Avery entered an Order, which found the Division of Workers Compensation lacked the "jurisdiction to hear the request for hearing by the respondent." The Judge reasoned the February 11, 2000, Order for Compensation was a final order and, therefore, the issues concerning claimant's post-award medical treatment and Fund liability had been determined.

16. But respondent appealed the August 6, 2003, Order to this Board. And in its July 1, 2004, Order the Board found the Division of Workers Compensation did have jurisdiction because the February 11, 2000, Order was in the nature of a post-award preliminary hearing order. Therefore, the Board concluded the findings that were made in the February 11, 2000, Order were subject to modification upon a full hearing of the issues. Consequently, the Board remanded the claim to the Judge to (1) schedule a final hearing to address Fund liability, (2) set the parties' terminal dates for introducing their evidence, (3) enter a final decision regarding claimant's right to receive benefits for her low back, and (4) determine the question of Fund liability regarding claimant's low back.[3]

17. The Fund appealed the Board's July 1, 2004, Order to the Kansas Court of Appeals. But in a decision dated April 21, 2005, the Court of Appeals dismissed the appeal for lack of jurisdiction. The Court of Appeals, however, did indicate the Fund could reserve its objections for the remand proceedings.

18. On August 5, 2005, the parties appeared before Judge Avery and announced they were appearing by reason of the Board's order for remand. The Fund again objected to the proceedings and reiterated its contention that the February 11, 2000, Order, which absolved the Fund of liability for claimant's low back condition, was a final order and could not now be modified. Conversely, respondent argued claimant's May 27, 1997, Award did not address her low back and, therefore, she could not request benefits for a new injury

[3] *Quandt v. IBP, Inc.*, No. 184,591, 2004 WL 1778919 (Kan. WCAB July 1, 2004), *appeal to Kansas Court of Appeals dismissed*.

in a post-award proceeding. In the alternative, respondent argued the Fund should be solely responsible for claimant's low back condition as it was found solely liable in the May 27, 1997, Award. Claimant adopted the Fund's arguments.

19. On September 2, 2005, the parties appeared at another post-award hearing before Judge Avery to address claimant's request for a treadmill. The Judge ordered the request for a treadmill consolidated with the remand proceedings.

CONCLUSIONS OF LAW

1. Was the February 11, 2000, Order for Compensation a preliminary hearing order or a final order?

Before July 1, 2000, there was no statute in the Workers Compensation Act that specifically addressed the manner an injured worker would proceed to obtain post-award medical benefits. Some workers would file applications for preliminary hearings under K.S.A. 44-534a and some would file requests to review and modify their awards. And some would do both, apparently thinking they could have a preliminary hearing in their review and modification proceeding that would be eventually followed by a final hearing, if one was warranted.

Now, K.S.A. 44-510k, which became effective July 1, 2000, addresses post-award requests for medical treatment. But before that statute, the Division of Workers Compensation allowed post-award preliminary hearings as a worker's immediate need for medical treatment and temporary total disability benefits could be equally urgent post-award as pre-award as the failure to obtain prompt medical treatment could result in irreparable injury. In addition, post-award preliminary hearings were not alien to the Workers Compensation Act as both K.S.A. 1999 Supp. 44-551(b)(2)(C) and K.S.A. 1999 Supp. 44-556(g) specifically referred to them. As helpful as K.S.A. 44-510k may be for future post-award medical requests, there is no statute that specifically addresses post-award requests for temporary total disability benefits, should those be warranted.

Accordingly, in requests for post-award medical benefits, the Division was guided by the general provisions of K.S.A. 44-523, which requires the parties a reasonable opportunity to be heard. Moreover, the Division was not bound by technical rules of procedure. That statute provides, in part:

> (a) The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

What is more, the fair implication is that any procedure may be used that is appropriate and not prohibited by the Act.[4] Moreover, there was nothing in the review and modification statute, K.S.A. 44-528, that prohibited a party from obtaining a preliminary hearing to address an urgent need for medical benefits, understanding that those preliminary findings would be subject to modification after the worker had reached maximum medical recovery.

There are important differences between preliminary and final hearings under the Act. Preliminary hearings, which are governed by K.S.A. 44-534a, are summary in nature and may result in preliminary awards of medical benefits and temporary disability benefits. The rules of evidence are relaxed as parties may introduce medical reports without supporting testimony from their authors. This is in stark contrast to final hearings, which require the Judge to set terminal dates for the parties to present their evidence.[5] And as suggested above, there was nothing in the review and modification statute that addressed which procedure should be followed.

In short, at the February 2000 hearing, claimant was requesting benefits that may be awarded in a preliminary hearing and the parties utilized preliminary hearing procedures.

Despite nothing being said at the February 4, 2000, hearing regarding the procedure that would be employed to address claimant's request for additional benefits and the resulting issue of Fund liability, the Judge specifically stated in the February 11, 2000, Order for Compensation that the hearing was held due to an application for preliminary hearing. In addition, the hearing transcript tends to indicate the hearing was more in the nature of a preliminary hearing than a final hearing.

At the hearing respondent's attorney advised Judge Avery that one of the issues was whether claimant's low back problems emanated from her 1993 fall or whether those problems arose as a natural consequence of her altered gait. Although it is conceivable claimant's testimony alone would provide an answer to that question, ordinarily that issue requires expert medical opinion testimony after an analysis of claimant's current condition, her past medical records, medical history and, perhaps, a physical exam. Moreover, as claimant had not undergone the low back treatment that she was requesting, as of February 2000, the best evidence of claimant's low back condition and its relationship to her 1993 accident was yet to come.

---

[4] *Bushey v. Plastic Fabricating Co.*, 213 Kan. 121, 515 P.2d 735 (1973); *Drennon v. Braden Drilling Co., Inc.*, 207 Kan. 202, 483 P.2d 1022 (1971). Also see *Craig v. Electrolux Corporation*, 212 Kan. 75, 81, 510 P.2d 138 (1973).

[5] See K.S.A. 2005 Supp. 44-523(b).

Indeed, the attorneys apparently believed more evidence would be introduced in claimant's request for post-award medical benefits and temporary total disability benefits as additional depositions were mentioned. Before claimant testified, her attorney announced:

> Judge, there is one other request. There's actually two, attorney's fees are at issue. But I would like to do it as we've done it in the past and once we finish with these issues, because we have depositions to be taken also.[6]

Another indication that the Order for Compensation was issued as a preliminary hearing Order is the manner the Judge ordered the benefits. For example, the Judge ordered additional medical benefits until claimant reached maximum medical improvement. And the Judge ordered temporary total disability benefits until she reached maximum medical improvement, was released to her regular job, or was returned to substantial and gainful employment. That language more appropriately reflects a preliminary award of benefits rather than a final determination of disability.

When considering all of the above, the Board concludes the February 11, 2000, Order for Compensation was not a final award or final determination for determining claimant's entitlement to ongoing medical benefits. Likewise, the Order for Compensation was not a final determination of the Fund's liability. Rather, the Order was in the nature of a preliminary hearing order that was subject to modification upon a final hearing. Whether the Order for Compensation is considered a preliminary hearing as part of a review and modification proceeding or considered as a post-award preliminary hearing for additional medical treatment, the outcome is the same. Consequently, the February 11, 2000, Order for Compensation was subject to modification. And respondent was entitled to present its evidence regarding the compensability of claimant's low back condition and the Fund's liability.

It may be argued the February 11, 2000, Order for Compensation should be considered a final order as it was subject to appeal. But the existence of the right to appeal is not the litmus test as preliminary hearing findings may be appealed from the initial order and later appealed when all the evidence is presented.

2. Is claimant entitled to post-award medical benefits, including a treadmill, for her low back condition?

The September 2, 2005, hearing before Judge Avery was short. Claimant presented somewhat dated medical records from Dr. Bowman's records. One note, which

[6] R.M.H. Trans. (Feb. 4, 2000) at 4-5.

was dated in May 2003, stated that claimant should have a treadmill to allow her to work out at home. The note reads, in part:

> She [claimant] returns to report that she is having difficulty as before but getting around. She is using a cane to walk. Most of her pain is in the lumbar area. It extends into the left hip but it is manageable. She has diminished her medications significantly. She is currently taking Neurontin 600 mg qid, Ativan 0.5 mg tid, Pepcid 20 mg a day and Tylox prn. She is neurologically unchanged from before with hyper-reflexia in her lower extremity. There is some weakness of the toe extensors on the left side. She continues to have abdominal swelling and pain in her groin, especially on the left.
>
> She is trying to increase her activity and level of fitness, but it is a struggle because of the increase in symptoms. We talked about some options for that. I would recommend she begin an aquatherapy program if it is available in Denison. I would recommend she get a treadmill and begin working out at home.[7]

In addition, claimant introduced a prescription form dated May 14, 2003, in which the doctor prescribed a treadmill for claimant's lumbar spine.

Although the Board is concerned about the age of the records presented, it is the only evidence that addresses the issue. Accordingly, it is uncontradicted that claimant should have a treadmill for her low back problems, which, as addressed below, are a natural consequence of her 1993 accident.

3. What is the liability of the Workers Compensation Fund for the workers compensation benefits provided claimant due to her low back?

Dr. Bowman is probably the most familiar with claimant's condition as he began treating claimant for neck and upper extremity complaints in late September 1998. And later, the doctor began treating claimant's low back.

The doctor was asked if claimant's 1993 fall caused the stenosis in claimant's low back or whether it was caused by the resulting altered gait from the right knee injury. He testified the limp was definitely an aggravating factor and that it was unknown if claimant would have developed the blockage or would have required medical treatment without her limp. Dr. Bowman, however, also testified claimant's lumbar injury was related to the 1993 accident as she had no low back symptoms before the accident but she developed constant low back symptoms afterwards. But, again, the doctor reflected upon the

[7] P.A.H. Trans. (Sept. 2, 2005), Cl. Ex. 1.

importance of the altered gait as it aggravated claimant's low back and contributed to her need for medical treatment.

> Q. (Mr. Worth) Do you believe, Doctor, within reasonable medical certainty, that the limp that Ms. Quandt has because of her knee injury was a factor or not in her low back complaints and need for care?
>
> A. (Dr. Bowman) Yes.
>
> Q. What is that opinion?
>
> A. That it was a negative factor and was aggravating to her low back.
>
> Q. Is it fair to say, Doctor, that after the slip and fall of 1993 that the limp she exhibited for the knee injury was a permanent, aggravating factor in her low back condition and need for care and treatment?
>
> A. Yes.[8]

As quoted above, Dr. Nye reported to Judge Avery in November 1999 that claimant's low back was aggravated by both the March 1993 accident and claimant's altered gait.

Claimant did not develop significant low back symptoms until January 1999 when she reported to Dr. Bowman that her low back was progressively worsening. The Board concludes it is more probably true than not that claimant's altered gait aggravated her low back and created the need for medical treatment. Consequently, claimant's low back condition is a natural consequence of her knee injury. Therefore, the Fund, which was held wholly responsible for claimant's knee injury in the May 1997 Award, is wholly responsible for the consequences of that knee injury, including claimant's low back.

Accordingly, the November 10, 2005, Order should be modified to assess the entire liability for claimant's low back injury against the Fund.

AWARD

WHEREFORE, the Board modifies the November 10, 2005, Order to assess the entire liability for claimant's low back injury against the Fund.

IT IS SO ORDERED.

---

[8] Bowman Depo. at 65-66.

Dated this ____ day of April, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING AND DISSENTING OPINION

I agree that the February 2000 hearing should be considered as a preliminary hearing and that it was proper to allow respondent a final hearing to determine the Fund's liability.

I believe the medical evidence is uncontradicted that claimant's low back condition and resulting need for treatment was contributed to by both the trauma caused by her 1993 fall and the resulting altered gait. The Fund would be responsible for the consequences of the altered gait as a natural and probable consequence of the right knee injury. But respondent would be responsible for the consequences of the 1993 fall as it lacked knowledge of a preexisting back condition. Moreover, respondent failed to establish the extent the altered gait contributed to the low back problem. Consequently, I believe respondent's request to transfer liability to the Fund for claimant's low back problems should be denied.

BOARD MEMBER

DISSENT

I respectfully dissent from the majority decision that the February 11, 2000 Order for Compensation was not a final order.

It is undisputed that the February 4, 2000 hearing was conducted after a final award had been made in the case. The claimant filed an application for review and modification seeking additional medical treatment. The Workers Compensation Fund filed a motion requesting that the ALJ also determine at that hearing the liability between respondent and the Fund regarding any potential treatment for claimant's low back.

At the hearing held on February 4, 2000, the ALJ specifically noted the proceeding was a review and modification proceeding. The Judge stated:

> JUDGE AVERY: This is the case of Nancy Quandt versus IBP, Incorporated, Docket No. 184,591. **We're here for a Review and Modification Hearing on the issue of additional medical treatment. . . .**[9] (Emphasis added.)

The ALJ had the parties state their respective positions. The claimant's attorney mentioned that attorney fees were an issue but noted that issue could be deferred until later. The Fund's attorney noted that the issue of Fund liability for the low back, if such condition was determined to be work-related, was disputed. Lastly, respondent's attorney noted there was a question whether respondent was aware whether claimant had a preexisting back condition but there remained the issue whether the back complaints were the result of an altered gait from the knee injury which would place liability on the Fund. And respondent further noted there remained the issue of causation of claimant's back injury.

The ALJ then requested claimant's attorney to call his first witness. Claimant's attorney noted that he did not have any testimony that he wanted to present and that the primary issue for determination at the hearing was the liability between respondent and the Fund. Consequently, the respondent called claimant as a witness and mainly inquired whether claimant had a preexisting back condition or problems with her back before the work-related accident. This questioning was obviously intended to elicit facts to warrant shifting liability for claimant's back treatment, if any, to the Fund. The Fund's attorney also questioned claimant regarding any preexisting back complaints, treatment for her back or restrictions relating to her back before the work-related injury. This questioning was also designed to elicit facts to prevent shifting liability for claimant's back treatment, if any, to the Fund.

---

[9] R.M.H. Trans. (Feb. 4, 2000) at 4.

As previously noted, it is undisputed the hearing followed the final award on the claim and was a post-award proceeding. The ALJ specifically identified the proceeding as a review and modification hearing. Moreover, the issue of the liability between the respondent and the Fund for medical treatment for claimant's back condition was the primary matter addressed at the hearing. Neither respondent nor the Fund requested that the ALJ set terminal dates so that additional evidence could be presented.

The ALJ then issued his decision specifically finding that respondent was liable for the cost for medical treatment for claimant's back, noting claimant did not have a preexisting back condition. A review of this decision was not requested by respondent. And even though the order was in a form typically used for a preliminary hearing order, that does not alter the fact that the decision was entered after a review and modification proceeding where the primary issue was a determination of whether respondent or the Fund was liable for treatment of claimant's low back condition.

The law in effect at the time of the February 4, 2000 hearing provided that decisions from review and modification proceedings were final orders and subject to review by the Board. Moreover, even if the proceeding was considered some type of post-award preliminary hearing, as determined by the majority, such decisions were also considered final and subject to full review by the Board.[10]

The determination that respondent was liable for claimant's medical treatment for her low back condition that was made in the February 11, 2000 Order for Compensation became a final order and res judicata when that decision was not appealed. Consequently, I would set aside the November 10, 2005 Order because the issue of liability between respondent and the Fund was determined by the February 11, 2000 Order for Compensation entered by Judge Avery.

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Derek R. Chappell, Attorney for Fund
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[10] *Bryant v. U.S.D. No. 259*, 26 Kan. App. 2d 435, 992 P.2d 808 (1999).